Elizabeth M. Murphy
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Proposed Revisions to Rules 12505-12511 of the FINRA Code of Arbitration Procedure—Discovery Production Lists
SR-FINRA-2008-024

Dear Ms. Murphy,

The Securities Arbitration Clinic at St. John's University School of Law is very pleased to accept this opportunity to comment on the proposed rule changes to Discovery Production Lists ("SR-FINRA-2008-024"). The Clinic does not support many of the proposed rule changes because we believe that some of them unduly burden both the customer and the arbitration process by requiring document production which not only is unnecessary but invasive. Additionally, the proposed rules are not entirely comprehensible to an average person who may be participating in the arbitration process pro se and without any professional legal advice.

The Securities Arbitration Clinic represents investors, most of whom are of modest means, in the arbitration process against brokers and brokerage firms. The Clinic believes that one of the goals of arbitration is to be a faster and more efficient alternative to litigation. Therefore, the Clinic feels that the proposed rule changes, which significantly broaden the scope of document production for the customer, is against the spirit of arbitration. Also, the Clinic recognizes that if we do not represent these investors, they will often times be forced to appear pro se. Therefore, it is necessary for the rules dictating presumptively discoverable documents to be streamlined and easy for a pro se customer to understand without legal advice. It is also important that the presumptively discoverable documents be truly relevant to most claims, as it is unlikely a pro se individual will know that he or she may object to the production of the documents.

Most significantly, the proposed changes would require a more in-depth production of the customer's financial information. Currently, a customer is required to produce federal income tax returns from three years prior to the first transaction at issue. FINRA proposes to expand this time period to five years prior to the first transaction at issue. This proposed rule change is burdensome to the customer and not necessarily relevant to the arbitration panel. It is questionable whether or not the entire income tax return is necessary, particularly Schedule "A" which lists itemized deductions. Although there are some deductions that may be listed on Schedule "A" which may be relevant to certain types of claims, these deductions may not be relevant to every claim. Therefore, it is unreasonable for FINRA to require every customer to submit Schedule A when it may not be relevant to his or her case. We also wholly question the purpose for expanding the relevant time period to five years prior to the first transaction. We do not see how this would be relevant to the broker or firm to establish their defenses. A customer's financial information for a period five years before the first transaction, which may be as long as

eleven years ago, has no bearing on whether or not there was misconduct in an account. It is not reasonable that a customer should be subject to such invasive scrutiny at a time when he or she is simply trying to right a wrong.

Aside from the two year increase for the production of financial information being unnecessary, it may also be entirely impossible. The IRS maintains tax records for only the prior six years. FINRA is putting a greater burden on customers than the IRS does. If the customer does not have their tax records, he or she may not have any way of getting the documents. If a customer is unable to produce these tax returns, during an arbitration, it may raise a negative inference—which is not fair given the unfeasibility of document collection.

FINRA also proposes to amend Current List 2, Item 2—which requires the customer to produce financial statements or similar statements of the customer's assets, liabilities, and/or net worth for the period(s) covering the three years prior to the first transaction at issue—by expanding the covered period to five years. This five year production rule also would require the customer to identify each securities firm where the customer has maintained an account and to produce account statements. Again, this rule proposal places an inequitable burden on the customer for several reasons. A customer's previous investing or past financial activity at other firms five years prior to the transactions at issue is not relevant to the issue at arbitration.

A customer is waiving rights when he participates in arbitration. The customer does not elect to engage in arbitration but rather it is a venue chosen by the broker or firm in every account agreement. The customer is losing out on several of the benefits of litigation such as a jury trial and often, the possibility of punitive damages. The loss of these benefits are somewhat offset by the speed and efficiency of arbitration. With the expanded discovery required from the customer, the customer would be not enjoy the benefit of arbitration, a more time efficient alternative to litigation, because they would be bogged down in excessive discovery. A situation would exist where a customer is incurring the load of litigation discovery without reaping the litigation benefits. A situation such as this would be highly inequitable and would possibly dissuade customers from participating in the system.

Other proposed rules requiring the customer to expand document production include: documents relating to accounts or transactions at the firm regardless of whether the documents were signed by the customer; non-confidential settlements regarding other securities actions; and copies of loan applications.

FINRA states that the expanded period would provide parties with a broader understanding of a customer's financial status during that relevant period. However, what a customer's financial state was five years prior to the first transaction at issue is not relevant to whether a broker or firm acted properly. These documents are not required to be produced by a customer when entering into a transaction, so it is difficult to understand what relevance they could have to a claim. There is nothing preventing a firm from making a supplemental document request, and arguing that the documents are

relevant to that particular claim. It is inequitable to make these documents presumptively discoverable in every case and place the burden on the customer to object to their production.

The Clinic also finds issue with some of the stylistics of the proposed rules. Some of the language of the proposed rules mirrors partial language found in SEC Rule 17a-3(a)(6) and (7). For example, the proposed rule refers to “memorandum of order” in List 3 but that is not a clear term. In the context of Rule17a-3, it is very clear, but the guide should be explicit that it expects the firm to produce the documents it is required to keep pursuant to that rule. An ambiguity such as this could allot a broker or firm more room to not produce certain documents. The guide should be explicit that it expects the firm to produce the documents it is required to keep pursuant to that rule.

The new list structure may also be confusing for the customer. Currently, the even numbered lists are for the customer, and the odd numbers are for the firm. However, with the proposed changes, this is no longer the case. Certain customer lists contained no items, but the list remained as a place holder. Those were removed, and now, there is no structure to the list format. It would make more sense to simply put all of the customer lists together and all of the firm lists together. This will make the format more user-friendly for the customer, who may be representing himself pro se without legal assistance. The customer should be allotted as much assistance as possible to place him or her on equal footing to the broker or firm, who usually have the benefit of counsel and who specialize in defense work. The production lists should be easy to follow for the customer and they should be understandable. To this end, the Clinic supports FINRA’s proposal to change the term “churning” to “excessive trading” because it is more descriptive to the customer and is a more familiar term.

There is a point of confusion regarding FINRA’s proposal to limit discovery to five securities/products selected by the customer to minimize delays in the discovery process for unsuitability claims. This proposed rule would limit the amount of discovery that a customer could receive without taking into account that the broker or firm may be culpable for the mishandling of more than five securities or products. While it is a worthy goal to minimize delays, FINRA is doing so at the customer’s expense. The proposed changes drastically expand the number of documents a customer must produce, but unreasonably limits the documents a firm must produce. There is no question that documents relating to all of the securities at issue in a claim are relevant, yet these are not to be considered presumptively discoverable. This change actually serves as a final example of the criss-crossed goals of FINRA: to decrease speed through extraneous paperwork for the customer while decreasing the number of documents a firm must produce.

We do not support FINRA’s proposed changes which would require full disclosure of the customer’s financial and personal information. A customer’s consent to enter into arbitration is not a consent to fully disclose all of his finances to the panel. Nor do we support the stylistic changes which would confuse a customer who was filing a claim pro se. We believe that these proposed changes would only serve to benefit the firm

or broker, and would serve as a huge disadvantage to the customer, who has been forced into arbitration. The Discovery Production Lists should place both sides on equal footing and allow an unbiased panel to evaluate each party's claims and defenses without prejudicial, irrelevant facts. Thank you for your consideration of this important matter.

Respectfully,

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Legal Intern

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